DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-216714; B-216714.2 **DATE:** March 5, 1985

MATTER OF: Woodward Associates, Inc.; Monterey Technologies, Inc.

DIGEST:

1. A proposal modification submitted after the time set for receipt of best and final offers by an offeror who did not submit the otherwise successful proposal may not be accepted.

2. Agency should reopen negotiations where it appears that the agency inadvertently may have misled one of the two offerors in the competitive range concerning its opportunity to revise its proposal in response to a request for best and final offers.

Woodward Associates, Inc. protests the award of a contract to Monterey Technologies, Inc. under request for proposals (RFP) No. J0145034, issued by the Bureau of Mines, Department of the Interior. Woodward complains that the agency improperly accepted a late modification of Monterey's proposal which displaced Woodward as the low offeror. The agency now agrees with Woodward and has instructed Monterey to stop performance, but prefers not to take corrective action without the concurrence of this Office. Monterey participated in Woodward's protest as an interested party and also filed its own protest contending that the procedures used in this procurement were not proper and and therefore the agency should recompete its requirement.

We sustain both protests. We recommend that the agency reopen discussions by requesting new best and final offers from both Woodward and Monterey.

The solicitation sought proposals for a study of the extent to which industry designs "maintainability" into mining equipment and the effect of such designs on productivity and injury rates. The solicitation stated that the government contemplated a cost-reimbursement contract, but that other types of contracts would be considered. Award was to be made to that responsible offeror whose conforming proposal was most advantageous to the government, with technical factors being more important than cost.

The agency received four technically acceptable proposals in response to the solicitation. Following an initial round of discussions and the evaluation of revised proposals, the agency determined that only two proposals, those of Woodward and Monterey, were in the competitive range. The firms received technical scores of 878 and 844, respectively. Woodward's projected cost to the government was $386,638. Monterey's initial cost proposal totaled $763,476, but the firm reportedly revised its cost proposal after the first round of discussions to $623,724 for the work specified in the solicitation and $104,047 for what Monterey called "Option II," a training package for the mining industry. The agency conducted cost negotiations with both Woodward and Monterey and requested that the firms submit best and final offers by August 2, 1984. Monterey's final cost proposal was for $376,238, plus $85,186 for Option II. Woodward's proposed costs totaled $386,638 under a cost-plus-fixed-fee type contract. Woodward also offered to perform for $422,000 under a firm, fixed-price contract.

The agency was concerned that Monterey's drastic reduction in its proposed costs might result in cost overruns if the firm were awarded a cost-reimbursement contract. After receiving assurances that the statement of work could be modified to accommodate a firm, fixed-price contract, the contracting officer decided to reopen discussions with Monterey and Woodward and, by telephone on August 29, sought best and final offers from the firms on a fixed-price basis. The contracting officer reportedly set September 7 as the deadline for submission of best and final offers. Monterey responded by telegram and letter,

each dated August 30. In both, Monterey confirmed its price of $376,238 and stated that it would accept a firm, fixed-price contract. Woodward offered a firm, fixed price of $349,000.

On September 18, Monterey's president called the agency to inquire about the status of the procurement and was surprised to learn that Woodward had been allowed to submit a lower offer. Apparently, Monterey had understood the call for new best and final offers as merely a request for Monterey to confirm the amounts stated in its cost proposal and to indicate whether it would accept a firm, fixed-price contract. Monterey says it thought the competitive phase of this procurement was over and that it was in line for award. The contracting officer reports that Monterey's request on September 18 for permission to submit a further best and final offer was refused, but Monterey says such permission was granted. In any event, by telegram dated September 18, Monterey reduced its price to $334,547. Based on Monterey's price reduction, which displaced Woodward as the low offeror, the contracting officer awarded a contract to Monterey, citing its lower price as the determinative factor since both firms appeared capable of satisfactory performance.

The contracting officer reports that at the time of award, Monterey was considered the low offeror based on the solicitation's Late Submissions, Modifications, and Withdrawals of Proposals clause, which stated in relevant part:

> ". . . a late modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

See also the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.215-10(f) (1984). The contracting officer now says, however, that acceptance of Monterey's late modification was improper because Monterey did not submit the "otherwise successful proposal." The agency says that the award should have gone to Woodward because, as of the September 7 closing date for the second round of best and

final offers, Woodward had submitted the higher-rated technical proposal and had offered to perform at a lower cost.

We agree with the agency that acceptance of Monterey's late modification was improper. A proposal modification received after the time set for receipt of best and final offers may be considered only under the circumstances stated in the solicitation. See Real Fresh, Inc., B-204604, Dec. 31, 1981, 81-2 CPD ¶ 522. The solicitation clause quoted above allowed the government to accept more favorable terms only from an offeror that would receive the contract anyway. See Blue Cross of Maryland, Inc., B-194810, Aug. 7, 1979, 79-2 CPD ¶ 93. In such circumstances, other offerors could not complain because their relative standing would not be affected. The clause did not, however, permit acceptance of a late modification from a firm that was not already in line for award. See Windham Power Lifts, Inc., et al., B-214287, Mar. 7, 1984, 84-1 CPD ¶ 278. In this case, the agency says that Woodward, not Monterey, was the otherwise successful offeror. Thus, there was no basis for accepting a modification of Monterey's proposal received after the time set for receipt of best and final offers. Poli-Com, Inc., B-198494, Nov. 6, 1980, 80-2 CPD ¶ 341.

We sustain Woodward's protest. Rather than recommending award to Woodward, however, we recommend that the agency reopen discussions with both offerors. The reason for our recommendation is that it appears the agency inadvertently may have misled Monterey concerning its opportunity to revise its proposal in response to the request for best and final offers.

Monterey's failure to submit a more price-competitive offer in response to the contracting officer's August 29 telephone call appears to have been due to that firm's failure to understand that negotiations had been reopened. Monterey's position is that it did not receive a request for a new best and final offer, but only a request that it confirm its cost proposal and an inquiry regarding the acceptability of a firm, fixed-price contract. The firm's letter and telegram of August 30 are consistent with this position. Although the agency gives a different account of the telephone conversation, the record does not contain

a contemporaneous memorandum concerning the call and we are not otherwise able to determine exactly what was said. Further, assuming as we did in sustaining Woodward's protest that the agency in fact reopened negotiations in the August 29 telephone call, the regulations require that upon completion of discussions the contracting officer "issue" a request for best and final offers, FAR § 15.611, a requirement that, while admittedly somewhat ambiguous, we believe contemplates a writing. The agency issued no such writing here.

Based on the uncertainty concerning the August 29 telephone call and on the lack of a written request for best and final offers, we cannot conclude that Woodward and Monterey each had an equal opportunity to compete. We recommend therefore that the agency reopen negotiations with both offerors by requesting new best and final offers. If Woodward is the low offeror, and award to that firm otherwise would be proper, the agency should terminate the contract with Monterey for the convenience of the government and award a contract to Woodward. If Monterey's offer is lower than its current price, its contract should be modified accordingly. We recognize that reopening negotiations after prices have been revealed creates an auction, a situation that generally is to be avoided, FAR § 15.610(d)(3); however, we believe that in this case the need to ensure that both parties have competed on an equal basis outweighs any potential harmful effect on the competitive procurement system. See Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD ¶ 256.

Obviously, this situation would not exist if the August 29 request for best and finals had been confirmed in writing. Since the FAR requires only that the contracting officer "issue" a request for best and final offers, FAR § 15.611, we are recommending to the FAR Secretariat that this section be revised to include a specific requirement that oral requests for best and final offers be confirmed in writing.

We sustain both protests. Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Apropriations, and to the House

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Committees on Government Operations and Appropriations. Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

for Milton J. Socolar
Comptroller General
of the United States